

LAW OFFICES

COHN AND MARKS

SUITE 600

1333 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036-1573

TELEPHONE (202) 293-3860

FACSIMILE (202) 293-4827

HOME PAGE WWW.COHNMARKS.COM

DOCKET FILE COPY ORIGINAL

97-91

OF COUNSEL

MARCUS COHN
LEONARD H. MARKS
STANLEY S. NEUSTADT
RICHARD M. SCHMIDT, JR.

JOEL H. LEVY
ROBERT B. JACOBI
ROY R. RUSSO
RONALD A. SIEGEL
LAWRENCE N. COHN
RICHARD A. HELMICK
WAYNE COY, JR.
MARK L. PELESH
J. BRIAN DE BOICE
EDWARD N. LEAVY

SUSAN V. SACHS
JOHN R. PRZYPSZNY
A. SHEBA CHACKO
KEVIN M. GOLDBERG
MICHAEL A. McVICKER
SHARON H. BOB, PH.D.
HIGHER EDUCATION
SPECIALIST ON
POLICY AND REGULATION

DIRECT DIAL: (202) 452-4817

INTERNET ADDRESS: lnc@cohnmarks.com

May 28, 1997

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Dear Mr. Caton

On behalf of Heftel Broadcasting Corporation, there are herewith submitted and original and four (4) copies of its Motion To Strike or, Alternatively, Motion for Leave To File Further Reply, and Further Reply with reference to the Commission's Notice of Proposed Rule Making and Order to Show Cause, DA 97-489 (MM Docket No. 97-91; RM-8854) (released March 14, 1997).

Please direct any inquiries regarding this matter to the undersigned counsel.

Sincerely



Lawrence N. Cohn

Enclosure

No. of Copies rec'd
List ABOVE

044

RECEIVED

ORIGINAL

MAY 28 1997

Federal Communications Commission
Office of Secretary

BEFORE THE

Federal Communications Commission

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 97-91
Table of Allotments,) RM-8854
FM Broadcast Stations.)
)
Lewisville, Gainesville, Robinson,)
Corsicana, Jacksboro, and)
Mineral Wells, Texas)

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Motion To Strike or, Alternatively, Motion for
Leave To File Further Reply, and Further Reply**

Heftel Broadcasting Corporation ("Heftel"), by its counsel, hereby submits this Motion To Strike Section I (at pages 1-3) of the "Reply Comments" submitted by Metro Broadcasters-Texas, Inc. ("Metro") on May 20, 1997, in the above captioned proceeding; alternatively, Heftel requests permission to reply to the arguments advanced in Section I of Metro's Reply Comments. In support thereof, Heftel states the following.

Motion to Strike

Section I of Metro's "Reply Comments" (titled "Heftel's Proposal is Defective Because It Failed to Protect the Reference Coordinates For the Existing Allotment of Channel 240C1 at Mineral Wells") is nothing more than a supplement, with references to cases not previously cited, to the argument put forward on page 2 of Metro's initial Comments filed on May 5, 1997 (wherein Metro contended that Heftel's proposal should not be adopted "because Heftel has failed to protect the existing Channel 240C1 allotment at Mineral Wells.") Section I of Metro's Reply Comments does not reply to any matter which was even remotely referred to in the Comments which Heftel filed on May 5, 1997. This part of Metro's "Reply Comments" is therefore unauthorized and should be stricken.^{1/}

^{1/} Section I of Metro's Reply Comments does track and support the position advanced by Jerry Snyder and Associates in its Comments; however, the Commission should not allow Metro to have a "second bite at the apple" by the expedient of pretending to "reply" to the comments of a party (Snyder) whose position it supports. One of the purposes for the filing of comments is to apprise interested parties of the positions of others so that they have a fair opportunity to file informed reply comments. It is unfair for Metro to use the guise of filing "reply comments" to add additional support for its position by citing authority to which it might have referred in its initial comments but did not.

Motion For Leave To File Further Reply and Reply

If the Commission does not strike Section I of Metro's "Reply Comments," Heftel hereby seeks permission to reply briefly to the arguments raised therein, and in particular, to the authorities cited therein which were not mentioned in Metro's Comments or in the comments of any other party (i.e., Driscoll, Gregory and Robstown, Texas, 9 FCC Rcd 3580 (Chief, Allocations Branch, 1994) ("Driscoll"), Martin and Tiptonville, Tennessee, 11 FCC Rcd 12695 (Chief, Allocations Branch 1996) ("Martin"), and Eldorado and Lawton, Oklahoma, 5 FCC Rcd 618 (Chief, Allocations Branch, 1990) ("Eldorado")).

Metro contends, at page 2 of its Reply Comments, that "Heftel is still required to protect the Channel 240C1 allotment since its petition does not include a request to delete the channel," and cites Eldorado as authority. Heftel does not understand this contention, as Heftel did propose in its Petition the deletion of Channel 240C1 at Mineral Wells, and the substitution of Channel 240C3 (with a corresponding change in the reference point to the site currently used by Station KXYS-FM).

Metro cites Driscoll and Martin for the proposition that "the Commission will not delete a channel where there is an expression of interest demonstrated by the filing of an application by the initial comment deadline, even where a construction permit has been forfeited and canceled." Id., p. 2, footnote 3. Metro reads read far too much into these cases. In Driscoll, the Commission's Allocations Branch ("Branch") issued a Notice of Proposed Rule Making seeking comments on a proposed station upgrade, even though it would require the deletion of the only FM allotment in another community (Gregory). However, the Branch commented (without providing the slightest explanation or authority) as follows: "However, we note that the Commission would not delete a channel where an expression of interest is demonstrated by the filing of an application. Therefore, should the Commission receive an acceptable application by the initial comment deadline specified herein for Channel 283A at Gregory, Texas, petitioner's proposal to delete Channel 283A at Gregory may be dismissed." Id., at p. 3580.^{2/}

^{2/} A similar comment appears in Martin at pages 12695-6.

It is first to be noted that the foregoing comments are of no precedential value whatsoever. They are the purest dicta, as no application for the Gregory allotment was then pending before the Commission. Moreover, the situation anticipated by the Driscoll dicta is easily distinguishable from the present situation. In Driscoll the "expression of interest" which the Branch spoke about protecting (in the most hypothetical sense), was an application for a new service, while in this case, the pending Mineral Wells application seeks only to upgrade an existing facility. There is no reason to assume, as Metro does, that the Branch intended its above-quoted comments to be applicable in the case of the filing of an application for the upgrade of an existing station. Moreover, there is a good and obvious reason to distinguish between the two situations. The benefit to the public in providing a new service to a community far transcends providing of a upgrade to an existing station. Hence, even if the comment of the Branch were a holding rather than dicta, there would be good reason to limit its applicability to situations where an application for a new station is filed in conflict with a rulemaking petition.

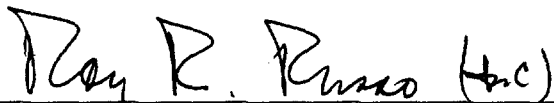
There is another flaw in Metro's argument. Metro assumes that, in the case of an application for a new facility which conflicts with a proposed allotment in a rulemaking petition, the Commission would automatically grant the application as proposed, even if another allocation were available in the same community, and without considering the public interest advantages of the proposal set forth in the conflicting petition. There is no warrant for this assumption. The Branch did not state that the Commission would necessarily dismiss the petitioner's proposal if an expression of interest were received by the comment deadline. Quite the contrary, it stated that the proposal "may be dismissed." Id. Thus, it appears that the Branch was mindful of the possibility that if the Commission received a timely "expression of interest," and if there were an acceptable alternative channel available, the Commission would not necessarily dismiss the petition, but would instead consider the available alternative.

That is essentially the situation here, where Heftel does not seek the dismissal of Snyder's Mineral Wells application (thus "protecting" it in the sense of not asking that it be dismissed outright), and the Station's right to continue operation on its

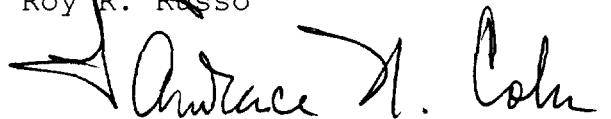
existing Channel 240C3 is uncontested. Under these circumstances, even if Metro's reading of Driscoll (and Martin, which closely parallels Driscoll) were correct, the Commission would not automatically dismiss Heftel's Petition, but would instead weigh the public interest benefits of the Mineral Wells upgrade proposal with those which would result from the grant of Heftel's Petition. Such a weighing of public interest considerations is mandated by Section 307(b) of the Communications Act; Metro's argument to the contrary would subordinate public interest considerations to private party interests.

Respectfully submitted,

HEFTEL BROADCASTING CORPORATION



Roy R. Russo



Lawrence N. Cohn

COHN AND MARKS
1333 New Hampshire Avenue, N.W.
Suite 600
Washington, D. C. 20036

Its Counsel

May 28, 1997

CERTIFICATE OF SERVICE

I, J. Edwena Johnson, a secretary in the law firm of Cohn and Marks, hereby certify that I have, this 28th day of May, 1997, sent by U.S. mail, postage prepaid, the foregoing **Motion To Strike or, Alternatively, Motion for Leave To File Further Reply, and Further Reply** to the following:

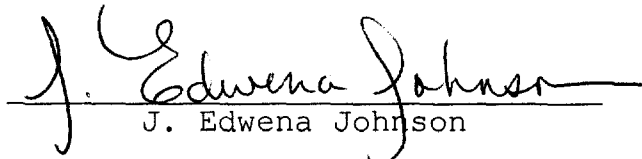
Robert Healy, Esq.
Smithwick & Belendiuk, P.C.
Suite 510
1990 M Street, NW
Washington, DC 20036
Counsel for Jerry Snyder
and Associates, Inc.

Mark N. Lipp, Esq.
Ginsburg, Feldman & Bress
1250 Connecticut Avenue, NW
Washington, DC 20036
Counsel for Hunt Broadcasting, Inc.

Harry C. Martin, Esq.
Andrew S. Kersting, Esq.
Fletcher Heald & Hildreth, P.L.C.
1300 North 17th Street
11th Floor
Rosslyn, Virginia 22209
Counsel for Metro Broadcasters-Texas, Inc.

Erwin G. Krasnow, Esq.
Verner Liipfert Bernhard
McPherson & Hand, Chartered
901 15th Street, NW
Suite 700
Washington, DC 20005-2301
Counsel for Graham Newspapers, Inc.

John F. Garziglia, Esq.
Patricia M. Chuh, Esq.
Pepper and Corazzini, L.L.P.
1776 K Street, NW
Suite 200
Washington, DC 20006
Counsel for K95.5, Inc.


J. Edwena Johnson